United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1370

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- -x

CANDIDO MAYET, JR., :

Appellant, :

-against- : Docket No. 74-1370

UNITED STATES OF AMERICA, :

Appellee. :

- -x

On Appeal from the United States District Court for the Southern District of New York.

REPLY BRIEF FOR APPELLANT

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Table of Authorities Cited

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REPLY BRIEF

This brief is submitted in reply to the Brief of Appellee, on behalf of Appellant Candido Mayet,Jr. in the matter of United States v. Candido Mayet and Marie Aguilar.

I. The government contends that defendants may not complain that items "not in evidence were impermissibly sent into the jury during its deliberations because such items were in fact withheld." (p. 12 of Appellee's brief). In support of this claim United States v. Burket, 480 F.2d 568 (2d Cir. 1973) is cited. Moreover, in clarifying Burket the government in a footnote (p. 12 of Appellee's brief) adds, that the "transmittal to the jury room of items not in evidence ... was found to be harmless error." The

government fails to express or clarify the rationale of this decision. Exposition, of the factual content of Burket reveals that it is inapposite to the case at bar.

In Burket, the essential charge was conspiracy to rob a bank and substantive counts arising from the alleged realization of the conspiracy. Burket and his coindictee Santana, were severed on motion of the prosecution. During trial, Santana obtained a directed verdict of acquittal at the close of the government's case. Burket, who was found guilty, appealed on the grounds that improper exhibits were admitted. The salient point in the Court's decision that such evidence was harmless, rested on the ground that the improperly admitted evidence, connected only Santana with the case but, "nothing was added to the evidence against Burket." United States v. Burket, 480 F.2d at 571. The other items to which objection were raised, were essentially of a neutral character, i.e. tags describing the exhibits and a photograph of Burket who had been identified in Court "more on his clothing than on his face." Thus, in the Burket case the improper matters were either directed at a defendant already acquitted or were of an absolutely neutral character. That such is not the case in the instant situation is apparent by the rapid rendition of a verdict subsequent to the request for the "handbag and its contents", and more importantly that without the "contents", the handbag had no connection

with Aguilar, and thus logically, not with Mayet either. The improper matters were crucial to the verdict, representing a fundamental link in the evidence, rather than as in Burket, where the improper matters were not even peripheral.

The fact that the contents of the handbag were not forwarded to the jury does not mitigate the jury's consideration of those contents as they recalled their display during trial. Germane to this point is the Judge's note in response to the request, which is noticed in appellant's brief,* and which makes explicit reference to those contents. The contents were in the jury room if not in their tangible reality, certainly in a reality that exceeded the mere permissible contemplation of testimony referring to those contents.** To the extent that they played so vital a part in the conviction, they were unlike the items in Burket, not merely neutral, but crucial, and improperly considered by the jury in their determination of the verdict.

In United States v. Adams, 385 F.2d 549, 550 (2d Cir. 1967), writings ostensibly offered but not accepted into evidence for proof of the signature of a government agent, were sent into the jury room upon their request. The Second Circuit reversing because the writings were never

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*"The Court: ... My note to them reads, 'The handbag, Exhibit 3 and the keys therein, Exhibit 5, are sent herewith. The other contents, while displayed in court and testimony taken as to them, were not received ...'" (p. 8 of Mayet's brief. Transcript at 775-777) (emphasis added)

** Graham v. United States, 257 F.2d 724, 730 (6th Cir. 1958) ("An exhibit even though identified by a witness is not in evidence until it is offered and received in evidence").

received in evidence said:

> "But the principle that the jury may consider only matter that has been received in evidence is so fundamental that a breach of it should not be condoned if there is the slightest possibility that harm could have resulted." United States v. Adams, 385 F.2d at 550-51 (emphasis added)

II. The second point asserted in appellant's brief, is that Mayet was effectively denied his right to counsel by virtue of counsel's absence at the time of the jury request for handbag and contents. Since, the colloquy between judge and counsel involved only counsel for co-defendant, it is apparent that defendant Mayet lacked vocal representation.

Initially, it may be noted that the important function of counsel at the juncture wherein evidence is demanded has been recognized by the courts. In United States v. Burket, 480 F.2d 568, 571 (2d Cir. 1973) the Second Circuit itself considered the notion that "defense counsel was as responsible as the prosecutor seeing to it that only proper exhibits were sent to the jury room", weighty enough, to foreclose discussion on appeal since defense counsel did not object at trial. It is clear, therefore, that the law considers counsel's function at this point in the case, crucial enough so that an omission of objection when counsel is present constitutes a waiver. In the case at bar counsel was not even present and could not object. When as here, counsel's lack of presence was engendered by the trial court's error, failure to object should not subject Mayet to the onerous effect of having his appeal denied under the aegis of having waived the objection.

The government contends first, that no prejudice resulted from the absence; but this contention rests only on the proposition that handbag and keys were considered whereas appellant's claim is that other matters were considered. Hence the government's statement is a conclusion resting on their own premise.*

Secondly, the government contends that "Mayet's attorney sought and obtained leave with Mayet's permission to absent himself and have Aguilar's attorney cover for both defendants if the jury sent in notes." (p. 14 of Appellee's brief). As iterated in appellant's brief ** Mayet's attorney assented to having Aguilar's attorney cover only to the extent of a "simple note," and from the colloquy between judge and counsel all indications point to the fact that neither side, nor the court itself considered the request "simple". Hence, it was incumbent upon the court** to call in Mayet's counsel, and the question of consent is not present in the instant issue, since both the court and prosecutor were aware that the consent of Mayet was confined to "simple notes."

Finally, the government contends that the interests were identical, and therefore the grant of such permission to have one counsel represent both defendants was proper.

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*Sawyer v. Brough, 358 F.2d 70, 73 (4th Cir. 1966), ("It is not necessary that [defendant] delineate the precise manner in which he has been harmed by the conflict of interest; the possibility of harm is sufficient to render his conviction invalid.") (emphasis added)

**"Mr. Stone (attorney for Mayet): I'll be five minutes away. If it is a simple note he can cover. If not I can run right back." (p. 12 of Appellant's brief). (emphasis added)

It is abundantly clear that the interests while parallel, are not however identical. They were even at trial diverse enough so that separate counsel were obtained, who pursued their own examination and cross-examination. The contours of the respective defense theories were divergent. Mayet may concede that cocaine was found in the pocketbook, and that a transaction took place, yet at the same time deny, as he did, any involvement with the venture.

For tactical reasons unknown to Mayet's counsel, Aguilar's attorney was prompted to make reference to the contents of the handbag during the trial. Therefore, when the jury requested the contents, he had no recourse but to concede to the Judge's instruction which, by referring to the contents* sub silentio, implicated Mayet with those contents. Mayet's attorney at this juncture would have undoubtedly petitioned that the Judge in his response clearly delineate that Mayet never identified nor was connected to the contents of the handbag. That the contents revealed feminine ownership went to the detriment of Aguilar, but because of the absence of Mayet's counsel and the concomitant failure to object to the Judge's reference to these "contents" the jury improperly linked the contents with Mayet; a link never established at trial.**

The government's supporting authorities to their

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* See note set forth at p. 2 supra.

**See note set forth at p. 9 infra.

contention that one counsel may represent both defendants are inapt. In United States v. Weiss, 491 F.2d 460 (2nd Cir. 1974) individual and corporate defendants were charged and convicted of conspiring and causing false invoices to issue in an attempt to defraud the government. On appeal the individual defendants claimed a lack of adequate representation because one counsel represented both. The Circuit Court flatly rejected this assertion pointing out that the individual defendants controlled the corporation and that the only alternative defense of ultra vires was therefore "a frivolous defense ... doomed to inevitable failure." United States v. Weiss, 491 F.2d at 469.

In Olshen v. McMann, 378 F.2d 993 (2nd Cir.) cert. denied, 389 U.S. 874 (1967) a thirteen year old conviction was sought to be overturned on the grounds that defendant's attorney had, unbeknown to defendant, also represented a key prosecution witness, in a prior proceeding. The court noted that "here, the possible conflict arises from a prior representation," and that "vigorous cross-examination" and attack vitiated the possible prejudice. Olshen v. McMann, 378 F.2d at 994 (court's emphasis). In the case at bar the conflict is generated not by prior but by simultaneous representation and the silence of Aguilar's attorney bears testimony that at this juncture Mayet lacked adequate representation.

United States v. Lovano, 420 F.2d 769 (2d Cir.) cert. denied, 397 U.S. 1071 (1970) involved a charge and

conviction for conspiring and violating federal counterfeiting provisions. Two of the defendants represented by one counsel appealed their conviction, claiming a denial of effective assistance of counsel because of the conflict of interest. The court refused recognition of this claim because defendants "were involved in completely different aspects of the conspiracy" and one defendant's part "did not begin until three days later" than the other defendant's role in the plan. Lovano, 420F.2d at 774. Moreover, the United States attorney prior to the inception at the trial conceded that defendants were involved in different facets. United States v. Lovano, 420 F.2d n. 13 at 773. In the instant case, Mayet and Aguilar were allegedly involved in one transaction, and further Aguilar's attorney had, by introducing the contents of the handbag, already taken a different approach than counsel for Mayet. To permit Aguilar's attorney to represent Mayet when the former had no choice but to accede to the request for the contents, was highly prejudicial to Mayet, since his attorney would have rightfully foreclosed any connection of these contents with Mayet.

The most telltale admission that the practice of assigning one counsel to represent both defendants may be error is evinced by Morgan v. United States, 396 F.2d 110 (2d Cir. 1968). There defendants were convicted of conspiracy and violation of the Mann Act. One of the defendants alleged that because he and his co-conspirator were represented by

one counsel prejudice inhered. The court in agreeing and remanding to the trial court for a hearing to investigate the adequacy of the common defense said:

> "This case makes it abundantly clear that district courts should exercise extreme care before the court assigns any counsel already representing a defendant to represent one or more other defendants who face the same charges. Despite what the appearances may be before trial, the possibility of a conflict of interest between two defendants is almost always present to some degree even if it be only in such a minor matter as the manner in which their defense is presented." Morgan v. United States, 396 F.2d at 114. (emphasis added)

Where, as in the instant situation, the "manner of the defense" has already displayed Mayet's lack of connection to the bag and contents*, it seems particularly prejudicial to have allowed Aguilar's attorney representing Mayet, to acquiesce silently in a transaction resulting in a pervasive notion that Mayet was connected to the contents.

Additionally, the conceptual analysis of the foregoing cases reveal that one counsel represented two defendants during the entire course of the trial. Here, after

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*The cross examination of Mayet by prosecution was as follows:

Q. You never saw Marie Aguilar with that pocketbook?
A. Not that I remember, no, I never had.

Q. Have you ever seen a cigarette case like this?
A. I don't smoke.

Q. Have you ever seen a bracelet like this?
A. I have, but in a million places.

(P. 12 of government's brief; Transcript at 633-34).

two attorneys commenced the trial, one was allowed to conclude, and while by admitting the instructions and contents Aguilar's attorney was consistent with his manner of defense, it was contradictory and harmful to Mayet's manner of defense.

III. The government treats appellant's third point in a footnote citing four cases in support. Concededly the problem of jury inquiry is a complicated one admitting of no easy solutions as appellant has noted in its brief.*

The cases cited by the government say nothing more than that "[i]t was not error to refuse to examine the jurors as to their mental processes." United States v. Crosby, 294 F.2d 928, 950 (2d Cir. 1961), cert. denied sub. nom, Mittleman v. United States 368 U.S. 984 (1962). This point is conceded in appellant's brief*, the thrust of the argument is rather, that instruction effectively foreclosed any inquiry to the jury since the able trial judge made no distinction as to what inquiries were permissible. Most importantly, the sanctioned prohibition against juror inquiry concerns primarily "interrogation or searching hostile inquiry" United States v. Driscoll, 276 F. Supp. 333 337 (S.D.N.Y. 1967) quoting from Rakes v. United States, 169 F.2d 739 (4th Cir.), cert. denied, 335 U.S. 826 (1948). No showing of contemplated hostile inquiry mandated the issuance of such an instruction. Finally, none of the aforementioned cases

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* (P. 18 of Appellant's brief)

call for such an instruction sua sponte.

IV. The government has failed to answer Mr. Mayet's charge that all the witnesses against him were "coerced", by anything except generalized argument.

For the reasons submitted herein and those stated in Appellant's brief the decision of the trial court should be reversed.

Respectfully submitted,

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